No. 78-599

In the Supreme Court of the United States

OCTOBER TERM, 1979

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. In describing the challenged regulations, respondents state that they contain "no procedural safeguards of any kind" (Br. 23 n.9). Respondents' description of the regulations is incorrect. The regulations require military commanders to report any refusal to authorize distribution of materials to headquarters authorities. See AFR 35-15(3)(a)(2); FMFO 5370.3, §4(c). See also *Greer* v. *Spock*, 424 U.S. 828, 831 n.2 (1976). Any serviceman who believes that his commander acted improperly by refusing to permit distribution of a petition may file a complaint with the commander's superior officers. 10 U.S.C. 938. The complaint must then be investigated and redressed if the commander's action was in error; and the Secretary of the military department is to be informed of the proceedings had on the complaint "as soon as possible." *Ibid.* Further review of the commander's decision may also be obtained by filing an action in federal district

court. See *Cortright* v. *Resor*, 447 F. 2d 245, 250-255 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). There are thus substantial procedural safeguards to ensure proper application of the substantive regulatory scheme.

Respondents do not contend that these procedures fail to satisfy any requirements of due process, and none of the courts below—either in this case or in *Brown* v. *Glines*—considered any such claim. The issue is thus not properly framed for review. We note, however, that the standards employed by the commander and his superiors in determining whether the on base distribution of petitions should be prohibited are drawn narrowly to reflect the government's most substantial concerns,[1] and the availability of prompt review of the commander's determination safeguards against arbitrary misapplication of the regulation. Even in the analogous context of civilian regulation of government facilities that are not public forums, these procedures would suffice. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555, 560 (1975)[2]. This is especially so here, where the

[1]The challenged regulations authorize commanders to prohibit distribution only when a petition would "[m]aterially interfere with the safety, operation, command, or control of his unit," "[p]resent a clear danger to the loyalty, discipline, morale, or safety to personnel of his command," "[i]nvolve distribution of material * * * that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter," or "[i]nvolve the planning or perpetration of an unlawful act or acts." FMFO 5370.3, §4(a) (1974). See also DOD Dir. 1325.6, para. III(A)(1) (1969). These narrowly drawn restrictions obtain specific content from military custom and usage. See *Parker* v. *Levy*, 417 U.S. 733, 753-760 (1974).

[2]In *Southeastern Promotions, Ltd.*, the Court held that, where a licensing requirement limits access to a public forum, the decision to withhold the license may have effect "only for a specified brief

military need "to maintain the discipline essential to perform its mission effectively" "may render permissible within the military that which would be constitutionally impermissible outside it." *Parker* v. *Levy*, 417 U.S. 733, 744, 758 (1974).[3] The regulations afford a prompt and reasonable means for determining whether distribution should be permitted while maintaining in the interim the discipline and morale that is essential to the military mission. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Although the issue is not presented in this case, the regulations do not deny due process. See *Terrell*, *supra* note 3, 28 Emory L.J. at 44-48.

2. Respondents argue (Br. 25-26) that the challenged regulations are shown to be unnecessary to national security by the government's failure to seek a stay of the injunction entered by the district court against application of the regulations at the Iwakuni military base. But the government has not contended that injunctions applicable

period" pending judicial review. 420 U.S. at 560. But the procedural requirements established in *Southeastern Promotions, Ltd.* apply only to licensing for the "use of a public forum" (*ibid.*) and are expressly inapplicable where the applicant "seek[s] to use a facility primarily serving a competing use." *Id.* at 555. When a facility is not a public forum to begin with, the power to deny its use in advance of actual expression is not constitutionally suspect. When an applicant seeks use of a military base—which plainly is not a public forum—for petitioning purposes, the base commander need not seek immediate judicial approval to protect the base from what is "perceive[d] to be a clear danger to the loyalty, discipline, or morale of troops * * * under his command." *Greer* v. *Spock*, *supra*, 424 U.S. at 840. See also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 300-303 (1974) (opinion of Blackmun, J.).

[3]"None of the cases involving First Amendment 'due process' requirements deal with situations remotely resembling those faced by the military. The function performed by a pornography censor cannot be constitutionally equated with the function of the military." Terrell, *Petitioning Activities on Military Bases: The First Amendment Battle Rages Again*, 28 Emory L.J. 3, 45 (1979) (footnote omitted).

to only a few plaintiffs or one military base create a demonstrable likelihood of immediate irreparable injury to the nation's defense.[4] We have argued instead that the nation's military preparedness would be threatened if—as the court of appeals concluded—military commanders world-wide were powerless to prevent the on base distribution of petitions that present a "clear danger to the loyalty, discipline, morale, or safety" of their commands. FMFO 5370.3, §4(a) (1974). See note 1, *infra*. It is the nation-wide and world-wide weakening of military preparedness that threatens the nation's security. It is to avert that broader result that we seek reversal of the decision below.

For the reasons stated here and in our opening brief in this case and in our briefs in *Brown* v. *Glines*, the decision of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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[4]It is ordinarily possible to reassign sensitive defense functions from one base to another at any given point in time.

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